

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

Carol A. Wilson, Administrator, <i>et al.</i> ,	:	
	:	
Plaintiffs,	:	Case No. 2:17-cv-317
	:	
v.	:	Judge Smith
	:	
Fioritto Construction, LLC,	:	Magistrate Judge Deavers
	:	
Defendant.	:	

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM IN SUPPORT OF THEIR
MOTION FOR SUMMARY JUDGMENT (ECF # 13)**

Pursuant to the Court's Order dated May 10, 2018 (ECF # 18), the Funds submit the following memorandum along with the attached affidavit of Carol A. Wilson reflecting the amount of the judgment to be granted in favor of the Funds against Defendant.

A. The Funds' practice of crediting contributions to the oldest outstanding amounts

The Trustees act as fiduciaries and manage the Funds for the benefits of the participants on whose behalf contributions are paid in by employers. When employer contributions do not cover the amounts due based upon all hours worked, the Funds credit the payments to the oldest unpaid amounts. See Affidavit of Carol Wilson ¶ 4 (attached as Exhibit A). This policy avoids the possibility for Employers to selectively contribute by paying for only favored employees and avoids claims that the Trustees are violating their fiduciary duties by arbitrarily favoring one participant over another. This practice has been previously considered and supported by this Court. Bunn Enterprises Inc. et al. v. Ohio Operating Engineers Fringe Benefit Programs, Case No. 2:13-cv-357 (S.D. Ohio Jan 20, 2016) (attached as Exhibit B).

B. The Accounting for the January 12, 2017 Payment

The Funds notified Defendant on January 5, 2017 of the audit findings. Wilson Aff. ¶ Exhibit 1. The Funds received payment in the amount of \$963.35 and applied that payment to the audit findings. On March 20, 2017, the Funds notified Defendant of the receipt of the payment and the adjusted balance due. Wilson Aff. ¶ 2. The Funds sought this adjusted amount in in their Complaint and in their Motion for Summary Judgement. (ECF #1 and #13).

C. The Calculation of Interest and Liquidated Damages

The Funds seek interest and liquidated damages pursuant to 29 U.S.C. § 1132(g)(2)(B). The statute provides that the interest rate is established by the plan. In this case, the Trustees have adopted an interest rate of 18 per cent per annum, which amounts to 1½% each month. Wilson Aff. ¶ 7, Ex. 3; Complaint ¶ 24. Employers are informed of this rate each month. Wilson Aff. ¶ Ex. 4.

In this case, interest was \$3,968.26 if paid by November 30, 2017. Affidavit of Samantha Polsinelli ¶ 6 (ECF #13-1); Wilson Aff. ¶ Ex. 5. As of the date of filing, interest amounts to \$5,547.46, increasing by \$8.40 for each day that the audit remains unpaid. Wilson Aff. ¶ 8. The Funds' calculation of these amounts is attached hereto. Wilson Aff. ¶ Ex. 5.

Liquidated damages are awarded in an amount equal to the interest amount. 29 U.S.C. § 1132(g)(2)(C)(i).

D. The Amount of the Judgment Sought

Pursuant to 29 U.S.C. § 1132(g)(2)(A) through (D), the Funds seek judgment in the following amounts:

(A) Unpaid contributions in the amount of \$17,034.04 (Wilson Aff. ¶ 5, Ex. 2);

- (B) Interest of \$5,547.46 through June 6, 2018, plus \$8.40 per day thereafter until the contributions are paid;
- (C) Liquidated damages of \$5,547.46 through June 6, 2018, plus \$8.40 per day thereafter until the contributions are paid; and
- (D) Attorney's fees and costs – in an amount to be sought in a post-judgment motion.

The total judgment amount sought is \$29,398.96 as of June 6, 2018, plus \$16.80 per day thereafter as long as the judgment remains unpaid, plus fees and costs in an amount to be determined.

Respectfully submitted,

/s/Daniel J. Clark

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2018, I electronically filed the foregoing *Plaintiffs' Supplemental Memorandum in Support of Their Motion for Summary Judgment* using the Court's CM/ECF system, which will send notification of such filing to the following ECF users:

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/s/Daniel J. Clark